93-762

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,

Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Seventh Circuit erred in holding, in conflict with other courts of appeals, that *Sisson v. Ruby*, 497 U.S. 358 (1990), forecloses consideration of the totality of the circumstances in the admiralty jurisdiction inquiry, and thereby extends admiralty law to situations where the injured parties and the instrumentalities have no maritime connections or attributes?

Does not the nexus prong of the *Sisson* test contemplate that the "activity" necessarily be defined differently from the "incident"?

LIST OF PARTIES

Petitioner, Claimant:

Jerome B. Grubart, Inc.

Respondent, Defendant:

Great Lakes Dredge & Dock Company

Defendant:

City of Chicago

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerome B. Grubart, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this cause on August 24, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 3 F.3d 225 (1993). It appears at page 1 of the appendix ("App.").

The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (C. Kocoras) has not been reported. It is reprinted at App. 22.

The order denying Petitioner's petition for rehearing with suggestion for rehearing *en banc*, and amending the Seventh Circuit opinion, is reprinted at App. 17.

JURISDICTION

Reacting to litigation against it in state court arising out of the Great Chicago Flood of 1992, Respondent brought this action in the United States District Court for the Northern District of Illinois invoking federal admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740. Respondent sought exoneration from or limitation of any liability it might incur from the claimants' state court actions. On February 18, 1993, the district court dismissed Respondent's complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). (App. 52).

On Respondent's appeal, the Court of Appeals for the Seventh Circuit, on August 24, 1993, reversed the district court's order and remanded the matter for further proceedings. (App. 1, 16). By order dated October 7, 1993, the Seventh Circuit denied Petitioner's petition for rehearing and amended its opinion of August 24th. (App. 17).

Petitioner's motion for a stay of the mandate pending the filing of its petition for certiorari was granted by the Seventh Circuit, and the mandate was stayed to and including November 15, 1993. (App. 20).

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water.

. . .

STATEMENT OF THE CASE

Thousands of plaintiffs, including Petitioner, Jerome B. Grubart, Inc. ("Grubart"),[1] were included in the scope of the "Chicago Flood" class-action lawsuit against Respondent, Great Lakes Dredge & Dock Company ("Great Lakes"), in the Illinois state court. The complaint alleges that Great Lakes, while under contract to the City of Chicago ("City"), negligently removed and replaced pile clusters in the Chicago River juxtaposed to a bridge. Great Lakes performed the pile driving from a stationary barge in the river and its activities resulted in the rupture of an underground freight tunnel system ("Tunnel") owned by the City. The Tunnel is located under the riverbed at the pile driving site, traverses the downtown business district of Chicago popularly known as the Loop, and directly connects to a number of Loop buildings. On April

[1] Pursuant to Supreme Court Rule 29.1, petitioner states that there are no parent companies or subsidiaries of petitioner.

13, 1992, over six months after Great Lakes' work, river water cascaded into the Tunnel at the pile driving site and inundated the basements of numerous downtown buildings, including the two locations of Grubart. Grubart's two locations are typical of those of the class action plaintiffs in that they are located in the Loop, which is generally said to begin approximately six blocks from the area of the Tunnel breach.

On October 6, 1992, a few days before the period for filing an admiralty claim was to expire, Great Lakes filed a three-count complaint in federal district court seeking exoneration from or limitation of liability and, additionally, indemnity and contribution from the City for all losses and damages occasioned and incurred from the breach of the Tunnel. The complaint alleged admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and the Admiralty Extension Act, 46 U.S.C. § 740. Upon the filing of that complaint, Great Lakes received a stay from the district court against all actions filed against it arising out of the Tunnel disaster.

Grubart filed its Claim and Answer in the admiralty action on November 6, 1992. Grubart and the City thereafter moved to dismiss Great Lakes' admiralty complaint. On February 18, 1993, the district court dismissed Great Lakes' admiralty complaint, concluding that its consideration of the totality of the circumstances "lead[s] unyieldingly" to the conclusion that the specialized set of rules invoked by application of federal admiralty jurisdiction is unnecessary. (App. 39). The district court held that it did not have subject matter jurisdiction and that Great Lakes' complaint failed to state a claim upon which relief could be granted.

On March 16, 1993, the Seventh Circuit denied Great Lakes' emergency motion for an extension of a Rule F(3)

admiralty stay but granted its motion for an expedited appeal. On appeal to the Seventh Circuit, Great Lakes contended that the district court misapplied the Supreme Court's most recent test for admiralty jurisdiction under 28 U.S.C. § 1333(1) by considering factors irrelevant to the jurisdictional analysis. Great Lakes also argued that the district court misconstrued the purpose of the Admiralty Extension Act, 46 U.S.C. § 740, when the court refused to invoke the act to extend admiralty jurisdiction to cover the substantial damages occurring on land.

In regard to the jurisdictional issue, the Seventh Circuit ruled that the district court erred by engaging in a policy analysis and examining the "totality of the circumstances." (App. 6-7). According to the Seventh Circuit, the district court should have limited itself to answering the three questions under this Court's *Sisson* test: (1) Did the alleged wrong occur on navigable waters of the United States? (2) Did it pose a potential hazard to maritime commerce? (3) Was it substantially related to traditional maritime commerce? (App. 6). The Seventh Circuit also invoked the Admiralty Extension Act in response to Grubart's objection that most of the damage occurred some distance from the river. (App. 8-9, & n. 5). The court, in a footnote, further concluded that the Extension Act seemed to cover this situation even if the instrumentalities or entities before it were not all engaged in the same activity. (App. 9, n. 5).

Grubart petitioned for rehearing on the grounds that the Seventh Circuit's analysis conflicted with that of the other circuits, which explicitly provide for consideration of factors such as those identified by and relied upon by the district court. By disregarding these facts, the Seventh Circuit had ignored the Supreme Court's admonition that

its *Sisson* test was capable of further refinement when the entities involved were not all engaged in the same activity, the situation presented by this matter. Grubart also argued that the Seventh Circuit erred by equating the "activity" and "incident" components of the *Sisson* nexus test. The Seventh Circuit denied this petition and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

In reaching its decision that admiralty jurisdiction applies to this matter, the Seventh Circuit misconstrued this Court's admiralty jurisdiction test established in *Sisson v. Ruby*, 497 U.S. 358 (1990), by focusing solely on the three individual components of that test while ignoring the substantial federal policy interests underlying the application of admiralty jurisdiction. The Seventh Circuit's exclusive application of the *Sisson* prongs conflicts with the decisions of most, if not all, other circuits which continue to address these policy considerations while interpreting the *Sisson* test. *See e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636 (11th Cir. 1992); *see also, Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625 (D.C. Cir. 1991). Significantly, the Seventh Circuit's mechanical approach tramples over any prospect of recognizing, let alone addressing, the inequities involved in imposing admiralty jurisdiction and substantive admiralty law on thousands of entities and individuals not remotely engaged in a maritime activity. The factual configuration in the instant matter—the parties being engaged in different activities—was not before the Court in *Sisson*

or any of its predecessors, a fact *Sisson* explicitly noted could require further refinement of the jurisdiction test. *Sisson*, 497 U.S. at 365-366, nn. 3-4.

In addition, the Seventh Circuit's invocation of the Admiralty Extension Act (46 U.S.C. § 740) ("Extension Act") to bootstrap its admiralty jurisdiction decision exemplifies the difficulty created by its myopic application of the *Sisson* formula. Other circuits have established that the Extension Act does not expand the traditional maritime activities which give rise to an admiralty claim; the Seventh Circuit's use of the Extension Act to create admiralty jurisdiction runs counter to this weight of authority and the legislative purpose behind the enactment. *See, e.g., Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987), *cert. denied*, 484 U.S. 944 (1989); *Jorsch v. Le Beau*, 449 F. Supp. 485 (N.D. Ill. 1978); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993); *Felix v. Arizona Dept. of Health Services*, 606 F. Supp. 634 (D. Ariz. 1985). Absent review and reversal by this Court, the Seventh Circuit's forced application of *Sisson*, and its untenable amplification of the Extension Act, will create confusion and perpetrate further injustices in innumerable future cases where parties not engaging in a maritime activity are swept into the maelstrom of admiralty law.

I. THE SEVENTH CIRCUIT'S MECHANICAL APPLICATION OF THE ADMIRALTY JURISDICTION TEST IS IN CONFLICT WITH FEDERAL AND STATE COURT DECISIONS ON THE SAME MATTER AND APPLICABLE DECISIONS OF THIS COURT

The *Sisson* admiralty jurisdiction test was refined over the last two decades in a trilogy of cases starting with *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S.

249 (1972), extending through *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and ending with *Sisson*. The *Executive Jet* case clarified that in order for a claim to be cognizable in admiralty, the injury must occur on navigable waters (situs test) and the activity must bear a sufficient relationship to maritime commerce (nexus test). *Executive Jet*, 409 U.S. at 268. In *Foremost*, this Court held that a maritime activity need not bear a substantial relationship to a commercial activity so long as it had a potential impact on maritime commerce. *Foremost*, 457 U.S. at 674-675. *Sisson* further refined the nexus part of the test by adding that: (1) the incident giving rise to the claim must have the potential to disrupt maritime commerce; and (2) the activity giving rise to the incident must have a substantial relationship to maritime activity. *Sisson*, 497 U.S. at 362-364. This progression by the Supreme Court has as its primary focus the federal interest in the protection of maritime commerce.

In *Sisson*, the Supreme Court declined to provide more explicit guidance for the second dimension of the nexus test—whether an activity is substantially related to traditional maritime pursuits. It recognized, indeed listed, the various "totality of the circumstances" tests used by the circuits to interpret this prong but did not overrule them. *Sisson*, 497 U.S. at 365-366, n. 4.[2]

After *Sisson*, the various circuits did not abandon their maritime nexus tests. The Third Circuit follows the same four-part inquiry used by the Fifth Circuit before *Sisson*. These four criteria are:

[2] This Court, in yet another area of the law, has recognized, established, and reaffirmed the importance of "looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 1993 U.S. LEXIS 7155, *10 (1993).

(1) the functions and roles of the parties,

(2) the types of vehicles and instrumentalities involved,

(3) the causation and type of injury, and

(4) traditional concepts of the role of admiralty law.

Sinclair v. Soniform, Inc., 935 F.2d 599, 602 (3d Cir. 1991). This is the original, widely-followed Fifth Circuit *Kelly* test (*Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)) discussed in *Sisson*. *Sisson*, 497 U.S. at 365-366, n. 4. The Fifth Circuit still adheres to its *Kelly* test. *Earl Wayne Coats v. Penrod Drilling Corp.*, 1993 U.S. App. LEXIS 27019, *21 (5th Cir. 1993); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 440 (5th Cir. 1991).

The Fourth, Ninth, and Eleventh Circuits also continue to abide by the four-part *Kelly* test after *Sisson* except that the Fourth and Ninth Circuits have modified their analysis with principles established by the Supreme Court. *Price v. Price*, 929 F.2d 131, 135-136 (4th Cir. 1991) (analysis of four factors tempered by traditional concern of admiralty law for torts arising out of navigational errors); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (four-factor test valid except that causation aspect dropped in view of *Sisson*); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993) ("fourth element excludes causation and is limited to the nature of the injury after *Sisson*"). *See also, Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636, 640-642 (11th Cir. 1992); *Cochran v. E.I. DuPont de Nemours*, 933 F.2d 1533, 1538-1539 (11th Cir. 1991), *cert. denied*, 116 L. Ed.2d 785 (1992).[3]

[3] State courts also follow the *Kelly* test. *See, e.g., Bias v. Tidewater Marine Service, Inc.*, 612 So.2d 927, 929 (La. App. 1993);

(Footnote continued on following page)

Using a *Kelly*-like analysis in the context of the *Sisson* requirements, the district court found that "[t]here are no traditional maritime concerns present here. . . ." (App. 40), based on its acceptance of the following facts in this matter:

1. None of the vessels were directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.
2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.
3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.
4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins at the Kinzie Street site [the pile driving site] was the protection of the bridge, which the Supreme Court views as an extension of land.
5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.

[3] *continued*
Fox v. Southern Scrap Export Co., Ltd., 618 So.2d 844, 847 (La. 1993). *But see, Torres v. City of New York*, 581 N.Y.S.2d 194, 204, 177 A.D.2d 97 (N.Y.App.Div. 1992), *cert. denied*, 123 L. Ed.2d 151 (1993) (the tests of the various federal courts of appeals "have, in our view, not led to satisfactory results").

6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

(App. 38-39).

In contrast, the Seventh Circuit's application of the *Sisson* inquiry broadens the scope of admiralty jurisdiction beyond any sense of reason, tradition, or pronouncement, direct or indirect, by this Court:

> We believe that, following *Sisson*, the jurisdictional inquiry must be more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself . . . *A court, therefore, may only ask the three questions posed above*, which we now consider seriatim.

(App. 7) (emphasis added). This completely misconstrues the direction of the Supreme Court's development of the admiralty jurisdiction test. There is no precedent in *Sisson* or the earlier Court cases for departing from a policy analysis in the admiralty jurisdictional inquiry. Rather, *Sisson* demands that a court not become fixated on the three parts of the *Sisson* jurisdictional analysis to the exclusion of the underlying federal interests of admiralty law:

> [T]he demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In *Foremost*, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction.
>
> * * *

Sisson v. Ruby, 497 U.S. at 364, n. 2 (citation omitted). Nevertheless, the Seventh Circuit asked only the three questions posed by the *Sisson* test; its reasoning appears to be an overreaction to the Supreme Court's reversal of the Seventh Circuit's previous view of what constitutes a "traditional maritime activity." *See In re Complaint of Sisson*, 867 F.2d 341, 345 (7th Cir. 1989) (the activity must be commercial or involve navigation), *rev'd*, *Sisson v. Ruby*, 497 U.S. 358 (1990). By eschewing a policy analysis such as that engaged in by the district court, the Seventh Circuit subverted the purposes behind the *Sisson* Court's directive.

Had the "totality of the circumstances" properly been considered in this matter, using the *Kelly* test or some other analogous standard, the parties would undoubtedly be in state court applying traditional common law rules of tort and contract, questions which are traditionally committed to local resolution. Instead, the Seventh Circuit's ruling has brought tens of thousands of individuals and businesses having no connection with a maritime activity into the jurisdiction of the federal courts because one party, the tortfeasor, happened to be working from a stationary barge on a river. Over-reliance on those facts harkens back to the old strict locality test from which this Court has spent decades retreating, for good reason. The national interest to be served by application of admiralty law, "uniformity of law and remedies for those facing the hazards of waterborne transportation" (*Kelly*, 485 F.2d at 526; *see also*, *Foremost*, 457 U.S. at 676-677), does not exist when the maritime elements are, at most, incidental and tangential to the nature of the tort claims and land-based elements of this calamity. In any event, the Seventh Circuit did not intimate that a federal interest motivated its application of admiralty jurisdiction here.

The Seventh Circuit's disregard for the examination specified by the *Kelly*-like tests in favor of a mechanical and stripped application of *Sisson* is a distinct deviation from the practice of the other circuits which have consistently incorporated a *Kelly* analysis in the *Sisson* test. Consideration of the *Kelly* elements at least allows a court to take into account the varying activities of the parties. Although the District of Columbia Circuit believes that the test to be used for the second part of the *Sisson* nexus prong is an unsettled question of law (*Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625, 633, n. 7, (D.C. Cir. 1991)), and although other circuits also appear to harbor some doubt about the nexus prong even while they apply their totality of the circumstances tests to the *Sisson* requirements,[4] their reaction has been one of reconciliation of the established circuit tests with the *Sisson* test rather than abandonment. In contrast, the Seventh Circuit's disregard of the important factual elements in this matter leads to no consideration of the activities of the parties or the instrumentalities involved. This approach conflicts with the clear mandate of this Court that such an issue might have a bearing on the jurisdictional inquiry and, consequently, it is implicit in the *Sisson* analysis that such factors be considered.

Only this Court can clear up the uncertainty which exists in the application of *Kelly*-like factors to the *Sisson* test,

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[4] After *Sisson*, the Fifth Circuit stated that "[i]n the absence of further guidance from the Court, we will continue to follow the *Kelly* approach and our cases applying it." *Broughton Offshore Drilling v. South Cent. Mach.*, 911 F.2d 1050, 1052 (5th Cir. 1990). *See also*, *In re Complaint of Bird*, 794 F. Supp. 575, 581, n. 9. (D. S.C. 1992) ("The nexus test as defined in *Sisson* . . . will invite confusion and inconsistent application on the part of lower courts seeking to apply it.").

especially when one injects the impact of parties not involved in a maritime activity into the jurisdictional inquiry. In addition to facing the injustice of a possible limitation action by Great Lakes brought under the Vessel Owner's Limitation of Liability Act (46 U.S.C. § 181 *et seq.*), imposition of admiralty jurisdiction in this matter also could deprive the injured litigants of the right to a jury trial. *See Complaint of Great Lakes Towing Company*, 395 F. Supp. 810, 813 (N.D. Ohio 1974); *Luhr Bros. Inc. v. Gagnard*, 765 F. Supp. 1264, 1267 (W.D. La. 1991). The federal interest in applying admiralty jurisdiction must be weighed against the constitutional interests of parties having no relation to a maritime activity being saddled with admiralty jurisdiction and the complications and limitations which follow.

II. THE SEVENTH CIRCUIT'S APPLICATION OF THE ADMIRALTY EXTENSION ACT IS IN CONFLICT WITH FEDERAL DECISIONS ON THE SAME MATTER

This Court in *Sisson* realized that the type of factual situation presented in the instant matter could require additional refinement of the admiralty jurisdictional formula. 497 U.S. at 365-366, nn. 3-4. The Seventh Circuit's solution to the dilemma posed by the substantial number of non-maritime litigants and facts involved in this matter was to invoke the Admiralty Extension Act (46 U.S.C. § 740):

> Grubart points to language the Supreme Court used in a footnote in *Sisson*: "Different issues may be raised in a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely addresses them" . . . Grubart suggests that this is such a case. If we were to adopt such a view in this case, however, we would render the Admiralty Extension Act meaningless. That act seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land.

(App. 9, n. 5) (citations omitted). One of the most disquieting aspects of the Seventh Circuit's statement is its facial simplicity. The Seventh Circuit's position renders the *Sisson* Court's footnotes meaningless. Considering that the *Sisson* test took decades to formulate, and developed against the backdrop of the Extension Act, the measured path of the admiralty jurisdiction test should not be derailed by a rogue application of the Extension Act in an appellate court footnote.[5]

The federal courts have stated that the Extension Act does not expand admiralty jurisdiction nor widen the traditional maritime activities which give rise to an admiralty claim. *See Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124, 125 (5th Cir. 1987), *cert. denied*, 484 U.S. 944 (1989); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-489 (N.D. Ill. 1978); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103, 1115 & n. 26 (E.D. La. 1993); *Felix v. Arizona Dept. of Health Services*, 606 F.

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[5] Perhaps the Seventh Circuit's statement that Grubart's argument would "render the Admiralty Extension Act meaningless" deserves more scrutiny. It is not implausible that modern judicial developments in this area have overtaken the statutory enactment. A proper analysis of the *Sisson* test which takes into account the totality of the circumstances should also solve the problems which the Extension Act sought to remedy. The Extension Act was enacted in 1948 when the locality of the wrong was the controlling, if not sole, consideration in applying admiralty jurisdiction. *See Executive Jet*, 409 U.S. at 260. *See also, Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 810 (5th Cir. 1989) ("[t]he legislative history of the Admiralty Extension Act demonstrates that its purpose was to correct such anomalies of the strict locality test. . . .").

Supp. 634, 636 (D. Ariz. 1985). Consequently, the Seventh Circuit should not have interjected the Extension Act into the midst of its *Sisson* analysis. (App. 8-9).[6] By doing so, it bootstrapped the threshold *Sisson* jurisdictional inquiry and, in effect, improperly created a cause of action through the Extension Act rather than through the *Sisson* test. *See Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 811 (5th Cir. 1989) (Extension Act cannot provide a separate basis for application of maritime law, citing act's Senate Report).

The Seventh Circuit's application of the Extension Act is further evidence of the improper, perfunctory jurisdictional inquiry it employed. The appellate court reproached the district court for considering the totality of the circumstances and then proceeded to apply a stifling interpretation of the *Sisson* test that dismissed the relevancy of the many facts found troubling by the district court. When Grubart directly confronted the appellate court with the *Sisson* admonition about the significance of having non-maritime entities and activities involved, the Seventh Circuit still refused to address the relevance of those circumstances and their potential impact on its interpretation of the *Sisson* test. Instead, it avoided an examination of those aspects by invoking the Admiralty Extension Act (and improperly at that) and washing its hands of the matter.

[6] The Seventh Circuit's reliance on the Extension Act in this matter is further clouded by the fact that neither Great Lakes' barge nor a defective appurtenance caused the accident. In order to invoke maritime jurisdiction under the Admiralty Extension Act, "[t]he vessel or its defective appurtenances must be the proximate cause of the accident." *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 975 (5th Cir. 1987); *see also, Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 260, n. 8 (1972).

The Seventh Circuit's misapplication of *Sisson* and the Extension Act works a terrible injustice on thousands of parties with no maritime connection and permits an alleged tortfeasor potentially to escape major liability when no federal interest in an admiralty adjudication has been implicated. It is time for this Court to answer its own question about the factual situation not presented in *Sisson* and to address squarely whether, and how, admiralty jurisdiction applies when none of the injured parties was engaging in a maritime pursuit.

III. THE SEVENTH CIRCUIT MISAPPLIED THE NEXUS PRONG OF THE *SISSON* TEST

The existence of admiralty jurisdiction is, as the Seventh Circuit recognized, embodied in the three-pronged test contained in *Sisson*. In order for admiralty jurisdiction to attach, "all three questions [must be] answered in the affirmative." (App. 6).

In *Sisson*, the "incident" was a fire, whereas the storage and maintenance of vessels in a marina was the "activity." *Sisson*, 497 U.S. at 362. In *Foremost*, the "incident" was the collision of vessels, while the "activity" was navigation in general of vessels. *Foremost*, 457 U.S. at 675. Implicit in the *Sisson* analysis is that the "activity" bearing a substantial relationship to a traditional maritime activity differ from the "incident" giving rise to the claim.

In striving to conform the facts in the instant matter to the required *Sisson* nexus analysis, the Seventh Circuit defined the "incident" posing a potential hazard to maritime commerce as "the installation of pilings from barges located in the navigable channel." (App. 9). Similarly, the court characterized the "activity" ostensibly having a relation to maritime commerce as "the sinking of

pilings into a riverbed." (App. 10). In spite of the artifice used by the Seventh Circuit to differentiate the "activity" from the "incident" in this matter, they are, in fact, descriptive of the identical conduct. The court merely added two elements required and found to exist for the *situs* test, "vessel" and "navigable waters" (App. 7-9), and erroneously reintroduced them as the decisive factual components of the *nexus* test. The net result is an illusory distinction between "incident" and "activity" crafted to fit the facts to the court's crabbed *Sisson* analysis.

This misidentification of the "incident" led to the Seventh Circuit's insupportable conclusion that there was an actual disruption to commerce arising out of the incident:

> This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this question answers itself. Yes, there was such a potential. In fact, it was realized.

(App. 9-10).

It is undisputed that the alleged harm in this disaster was the breach of the underground freight Tunnel. When defined correctly, the only conclusion one can make is that the Tunnel breach, like the fire in *Sisson*, is the "incident," and that, in this case, it did not have the potential to disrupt maritime commerce. The jurisdictional inquiry does not turn on the particular facts of the incident; here, the source or cause of the Tunnel breach. *See Sisson*, 497 U.S. at 365. Therefore, it does not matter for this part of the *nexus* test how the pilings were installed.

The Seventh Circuit's definition of the activity, *i.e.*, "the sinking of pilings into a riverbed", cannot be used to determine whether that constituted a potential hazard to maritime commerce. The Supreme Court did not refer to navigation in general (*Foremost*) or the storage of vessels in a marina (*Sisson*) as the conduct to analyze in assessing whether there was an actual or potential effect on maritime commerce. Obviously, the Supreme Court did not look to the "activity" for that part of the inquiry, for the answer would always be in the affirmative; if the conduct is defined in general terms as the "activity" invariably is, there will *always* be a theoretical, potential hazard to maritime commerce arising from it. Such a result would negate the need for any further inquiry and create a simple one-part *nexus* test in which a potential adverse effect on maritime commerce can simply be assumed. The Court explicitly rejected a suggestion to dispense with this part of the test. *See Sisson*, 497 U.S. at 364, n. 2.

None of the parties, including Great Lakes, claimed that the Tunnel breach posed a potential hazard to maritime commerce. Whatever impairment or rerouting of river traffic occurred was the result of repair efforts to the Tunnel chosen by the City and the U.S. Army Corps of Engineers after the accident. It was a discretionary decision on their part which led to a planned closing of part of the river and the closing had nothing to do with the barge or the pile driving activity. The Seventh Circuit, elsewhere in its Opinion, would "not allow the fortuitous existence of an elaborate tunnel system . . . to defeat jurisdiction." (App. 9); *see also, Executive Jet*, 409 U.S. at 268 ("These [fortuitous circumstances] are hardly the types of distinctions with which admiralty law was designed to deal"). Consequently, the Seventh Circuit should

not have relied on the fortuitous choice of repair efforts by the City and the Army Corps of Engineers six months after the tortious conduct to create admiralty jurisdiction.

It is also significant that none of the trilogy of Supreme Court cases mentioned the post-accident repair or rescue efforts which must have transpired in those cases and which are a necessary by-product of virtually any accident. Those events obviously had no role in the Supreme Court's formulation and application of the admiralty jurisdiction tests. It also has no relevance to this case.

By making the "activity" the same as the "incident," the Seventh Circuit further betrayed the *Sisson* test and found admiralty jurisdiction when a proper application of *Sisson's* three prongs would have found jurisdiction wanting. The Seventh Circuit selectively accepted fortuitous circumstances to reach its desired result. For the reasons stated in Sections I and II, *supra*, this is further expression of the Seventh Circuit's confusion about the proper implementation of the *Sisson* test and the domain of admiralty law. The issues presented by this litigation are insufficient to justify federal courts supplanting state law with the federal law of admiralty.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1421

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellee,

and

JEROME B. GRUBART, INC., an Illinois Corporation,

Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 26, 1993—DECIDED AUGUST 24, 1993

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and EISELE, *Senior District Judge.**

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* Hon. Garnett Thomas Eisele, of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

CUDAHY, *Circuit Judge.* On April 13, 1992, the Chicago River "sprung a leak." Mike Royko, *Putting in a Plug for the City that Leaks*, Chi. Trib., Apr. 14, 1992, at 3. On that date, a breach occurred in the roof of a freight tunnel running beneath the river. Water rapidly filled that tunnel and spread to the web of tunnels located throughout the city's downtown area. A number of buildings connected to this tunnel system were flooded and seriously damaged. Business in Chicago's downtown district was disrupted for many days as was maritime traffic on the portion of the river near the rupture in the tunnel wall.[1] Shortly after the leak was plugged, thousands of plaintiffs, including individuals, businesses and the City of Chicago (the City), filed suit in the Cook County Circuit Court against Great Lakes Dredge & Dock Company (Great Lakes), a contractor hired by the City to replace pile clusters (known in the trade as "dolphins") at five bridge sites along the Chicago River.[2] These claimants, for the most part, allege that Great Lakes negligently installed dolphins in the vicinity of the Kinzie Street Bridge and, as a result, caused the breach in the tunnel which, in turn, caused the flood.

On October 6, 1992, Great Lakes filed a three-count complaint in the district court, claiming the existence of federal admiralty jurisdiction. Count I demands exoneration from or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §§ 181-96 (the Limitation Act). In Counts II and III, Great Lakes requests indemnity or contribution from the City for any

[1] To assist repair, the Captain of the Port of Chicago ordered the river closed, for more than a month, between Grand Avenue on the North Branch, Cermak Road on the South Branch and Lake Michigan on the Main Branch.

[2] These lawsuits have been (and continue to be) assigned to a single judge and consolidated under the caption *In re Chicago Flood Litigation*, No. 92 L 5422.

damages that Great Lakes may be adjudged liable to pay.[3] Great Lakes contends that the City alone was responsible for the flood either because it failed to disclose to Great Lakes the existence of the tunnel near the Kinzie Street Bridge or because it failed to adequately repair and maintain the tunnel. Jerome B. Grubart, Inc. (Grubart), a downtown business which allegedly suffered damage as a result of the flood, filed a claim in the federal proceeding. The City and Grubart moved the district court to dismiss Great Lakes' complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted these motions. Great Lakes appeals, and we, considering the matter *de novo*, now reverse.

Article III, section two of the United States Constitution provides that "the judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," and 28 U.S.C. § 1333(1) places such power exclusively within the jurisdiction of the United States district courts. Our first task is to determine whether the tort at the heart of this litigation, Great Lakes' alleged negligence, is within the admiralty jurisdiction. We conclude that it is.

Before the last twenty years, admiralty jurisdiction over torts turned on the satisfaction of a so-called "locality" (or "situs") test. Under this test, "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865). This principle, however, never took the form of a holding of the Supreme Court, and, as early as 1850 the author of a noted treatise on admiralty law expressed doubt that admiralty jurisdiction depended solely on a maritime location. He suggested that admiralty jurisdiction existed, in tort cases, only if the tort bore some relationship to navi-

[3] Counts II and III were added by way of impleader pursuant to Fed. R. Civ. P. 14(a) & (c).

gation or maritime commerce. *See* Erastus C. Benedict, The Law of American Admiralty 173 (1850). The Supreme Court, however, did not squarely address this issue until 1972. Nonetheless, generations of admiralty practitioners and students believed that the locality test alone was controlling.

In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), an aircraft crashed into the navigable waters of Lake Erie after striking a flock of sea gulls while taking off. The Court held that there was no admiralty jurisdiction, despite the existence of a maritime situs, because "the wrong [did not] bear a significant relationship to traditional maritime activity." *Id.* at 268. Although the Court explicitly limited the application of this new "nexus" requirement to cases involving aviation torts, some courts applied it more broadly. *See, e.g., Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

Ten years after *Executive Jet*, the Supreme Court first said, although technically in dictum, that the "nexus" requirement was not moored to aviation disasters. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving the collision of two pleasure boats in navigable waters, the Court expanded its holding in *Executive Jet* in two ways. First, the "requirement that the wrong have a significant connection with traditional maritime activity" was incorporated into all assertions of maritime tort jurisdiction. *Id.* at 674. Second, the Court concluded that "traditional maritime activity" was not limited to *commercial* maritime activity. *Id.* The Court found that the "federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity." *Id.* at 674-75. It was enough, therefore, for purposes of sustaining admiralty jurisdiction, that the collision in *Foremost* had a "potentially disruptive impact" on maritime commerce. *Id.* at 675.

After *Foremost*, many courts, prominently including this one, grappled with the precise meaning of the "nexus"

requirement. The Supreme Court provided additional guidance in *Sisson v. Ruby*, 497 U.S. 358 (1990), *rev'g Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989) (Cudahy, J.). In *Sisson*, a fire erupted in the washer/dryer unit of a large pleasure yacht docked at a recreational marina on Lake Michigan, a navigable waterway. The fire spread to other recreational vessels and the marina itself. No commercial vessels were damaged since none were docked at the marina at the time of the fire (nor were any ever likely to be docked there). In reversing this Circuit to find admiralty jurisdiction, the Court bifurcated its analysis of the "nexus" requirement. The Court began by assessing the relationship between admiralty jurisdiction and the disruption of maritime commerce. The Court stated that the jurisdictional inquiry does not require an assessment of the incident's actual effects on maritime commerce. Rather, admiralty jurisdiction can exist if an incident creates a "*potential* hazard to maritime commerce," even though maritime commerce is in no way disturbed. *Id.* at 362 (quoting *Foremost*, 457 U.S. at 675 n.5 (emphasis supplied)). Moreover, in determining the existence of such a "potential hazard," a court does not consider the particular facts of the case before it, but "must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Id.* at 363. The Court concluded that the fire in *Sisson* "plainly satisf[ied]" this requirement, presumably because it could have damaged commercial vessels, had any been docked at the recreational marina at the time, or because the damage to the marina itself might have disturbed commercial maritime traffic.[4] *Id.* This seemingly rather remote

[4] Alternatively, perhaps the Court concluded that aquatic recreation *is* commerce. No one who has been to Disney World can doubt that recreation is big business. Seventy years ago, the Supreme Court reasoned that baseball, being a recreation, is not commerce and therefore is exempt from the federal antitrust laws. *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). Although the Court has never disturbed base-

(Footnote continued on following page)

possibility of impact on maritime traffic appeared to be enough to support admiralty jurisdiction.

The Court also reiterated its holding in *Foremost* that admiralty jurisdiction does not exist, notwithstanding an incident's potential impact on maritime commerce, unless there is "a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 364. The Court stressed that the relevant activity is "defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Id.* Accordingly, the Court characterized the relevant conduct in *Sisson* as "storage and maintenance of a boat at a marina on navigable waters." *Id.* at 365. Since this is a "common, if not indispensable, maritime activity," the Court concluded that admiralty jurisdiction did exist. *Id.* at 366.

After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity? If all three questions are answered in the affirmative, a claim arising out of the incident falls within the admiralty jurisdiction. The district court, although clearly cognizant of the *Executive Jet*, *Foremost* and *Sisson* trilogy, used a "totality of the circumstances" test, first articulated by the Fifth Circuit seventeen years before *Sisson* was decided, in assessing the existence of admiralty jurisdiction. *Great Lakes Dredge & Dock Co. v. City of Chicago*, No. 92 C

[4] *continued*
ball's antitrust exemption, it has, in recent years, acknowledged that "baseball is a business and it is engaged in interstate commerce." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). We can, therefore, speculate that the fire in *Sisson* was a potential hazard to maritime commerce because it, or more accurately, fires on pleasure boats generally, are likely to disrupt recreational activities on the water.

6754, slip op. at 14, (N.D. Ill. Feb. 18, 1993) (hereinafter Mem. Op. & Ord.) (citing *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)). The court also stated,

> Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules.

Mem. Op. & Ord. at 20. We believe that, following *Sisson*, the jurisdictional inquiry must be much more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself. *See, e.g.*, D.T. Plunkett, Sisson v. Ruby, *Muddying the Waters of Admiralty Jurisdiction*, 65 Tul. L. Rev. 697 (1991); Phyllis D. Carnilla & Michael P. Drzal, Foremost Insurance Co. v. Richardson: *If This is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1 (1983). A court, therefore, may only ask the three questions posed above, which we now consider seriatim.

Turning first to the "locality" requirement, we note that a tort occurs on navigable waters when its " 'substance and consummation' take place there," even though the allegedly negligent act itself occurred on land. 1 Benedict on Admiralty § 172 at 11-32 (7th ed. 1991) (quoting *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865)). There can be no doubt that the Chicago River, and all of its branches, is a navigable waterway of the United States. *See Escanaba Co. v. City of Chicago*, 107 U.S. 678, 683 (1883). Nor is there any dispute that Great Lakes' vessels were located in the navigable "channel" of the Chicago River while engaged in the removal and replacement of the pile clusters. Hence, it follows that the alleged tort—the negligent driving of pilings into the riverbed—occurred on a navigable waterway. It is of no consequence that the piling clusters were located outside of the navigable "channel," since the

navigable waterway extends from shore to shore. *See Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 263 (1915).

The City and Grubart make much of the fact that most of the damage in this case occurred on land far from the river. But the Admiralty Extension Act provides that the admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. The City and Grubart dispute the applicability of this provision on two grounds. First, they suggest that the barges from which Great Lakes operated are not "vessels" because they were, at that time, being used as stationary platforms. We have stated, however, that a craft is a "vessel" if its purpose is to some reasonable degree "the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). There is no doubt that Great Lakes' barges are capable of, and have performed, such transportation functions. Accordingly, they are "vessels." Second, the City suggests that 46 U.S.C. § 740 is inapplicable because the damage to the downtown businesses was felt at a time and place too "remote from the wrongful act." *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963). We must reject these contentions. We believe that the requirement of temporal proximity is nothing more than a specialized rule of proximate causation. And we do not believe that the elapse of six months, the period of time between Great Lakes' completion of its work and the flood, bars application of the Admiralty Extension Act.

Gutierrez itself illustrates why the Admiralty Extension Act comprehends the damage asserted in this case notwithstanding the fact that it was felt some distance from the river. In *Gutierrez*, a cargo of beans was packed aboard a ship in broken and defective bags. While the beans were being unloaded, some spilled out of the bags onto the surface of the pier. A longshoreman slipped on some of these

loose beans and was injured. Applying 46 U.S.C. § 740, the Court found the existence of admiralty jurisdiction. A similar result is indicated in the present case. Here water, like the beans, spilled into the freight tunnel through a breach allegedly caused by Great Lakes' negligence. We will not allow the fortuitous existence of an elaborate tunnel system, which simply transported the moving water away from the original breach and spread the damage, to defeat jurisdiction.[5] In sum, therefore, the incident satisfies the "locality" requirement.

Our next inquiry is whether the incident posed a potential hazard to maritime commerce. We are led to ask: Did the installation of pilings from barges located in the navigable channel of the Chicago River create a potential to disrupt commercial maritime activity?[6] This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this ques-

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[5] Grubart argues that there is no jurisdiction here because, even if Great Lakes' activities were traditionally maritime, the injured parties were not engaged in maritime activity. Grubart's Br. at 32-37. Grubart points to language the Supreme Court used in a footnote in *Sisson*: "Different issues may be raised in a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely addresses them." 497 U.S. at 365 n.3. Grubart suggests that this is such a case. If we were to adopt such a view in this case, however, we would render the Admiralty Extension Act meaningless. That act seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land.

[6] This is not the first case in which tunnels under the Chicago River have been the subject of litigation. In *West Chicago St. R.R. Co. v. Illinois ex rel. Chicago*, 201 U.S. 506, 521 (1906), for example, one such tunnel was itself found to be "an obstruction to free navigation on the river."

tion answers itself. Yes, there was such a potential. In fact, it was realized.[7]

Finally, we must determine if the activity in which Great Lakes was engaged is substantially related to traditional maritime activity. Great Lakes' activity at the time it allegedly caused, or precipitated, the flood may be described, in the most general terms, as the sinking of pilings into a riverbed. The parties make strenuous efforts to establish the purpose served by the particular dolphins that Great Lakes was hired to install. The City and Grubart contend that they were intended exclusively to protect the nearby bridges. Great Lakes concedes that this was one of their purposes but maintains that they were also designed to protect ships that collide with the bridges and to serve as navigation aids. But we need not resolve this debate, because we are concerned only with "the general character of the activity." *Sisson*, 497 U.S. at 365. There is no dispute that dolphins are capable of, and *generally* do, serve all of the purposes mentioned, two of which, protecting ships from collisions with bridges and aiding navigation, are unquestionably related to maritime activity. It follows logically that the installation of dolphins relates to maritime activity.

[7] The City reads *Sisson* to preclude any reliance on what really happened, citing the Court's language that the actual effects on maritime commerce are irrelevant. City's Br. at 30. But when *Sisson* and *Foremost* are considered in context, the fallaciousness of the City's argument becomes apparent. Maritime commerce was not disturbed by the incidents in *Sisson* or *Foremost*. Hence, the Court was forced to engage in a counter-factual analysis: Were the general features of the incidents in those cases likely to disrupt commercial activity? Here we need not engage in any such inquiry, since we know to an absolute certainty that Great Lakes' activity, and the incident it engendered, had the potential to disrupt maritime commerce. Moreover, we are not convinced by the City's argument that pile installation is generally more likely to damage adjacent structures than to interfere with maritime commerce. It seems no more likely that a crane or pile driver or some other piece of equipment used to remove and install pilings would fall toward the shore than out across the river.

Having found that the incident giving rise to the damage of which the City and Grubart complains satisfies all of the prerequisites of admiralty jurisdiction identified in *Sisson*, we conclude that the district court erred in dismissing this case for lack of subject matter jurisdiction.[8] Great Lakes' complaint must still fall though if it fails to state a basis for recovery. Accordingly, we direct our attention now to the Limitation Act, the substantive law upon which Great Lakes anchors its claim.

The Limitation Act provides that the liability of a shipowner for any loss or damage "done, occasioned, or incurred without the privity or knowledge of such owner . . . shall not . . . exceed the . . . value of the interest of such owner in [the] vessel." 46 U.S.C. § 183(a). Great Lakes' complaint is proper as to form and will, therefore, survive a Rule 12(b)(6) motion unless Great Lakes is not entitled to relief "under any set of facts that could be proved consistent with the allegations." *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992). The district court concluded that Great Lakes is clothed with "privity and knowledge" and thus is not entitled to the benefit of the Limitation Act. Consistent with this conclusion, the district court dismissed the complaint for failure to state a claim upon which relief could be granted.[9] Great Lakes does not dispute the district court's assertion that it bears the "ultimate burden of proving lack

[8] Because we conclude that 28 U.S.C. § 1333(1) adequately supports the district court's jurisdiction, we do not address Great Lakes' contention that the Limitation Act is an independent source of subject matter jurisdiction.

[9] We agree with the district court that both components of count I of Great Lakes' complaint, which seeks limitation of and exoneration from liability, rise or fall together, *see Wheeler v. Marine Navigation Sulphur Carriers, Inc.*, 764 F.2d 1008, 1011 (4th Cir. 1985) ("[O]nce limitation is denied, [claimants] should be permitted to elect whether to remain in the limitation proceeding or to revive their original claims in their original fora."), and that subject matter jurisdiction over counts II and III hinges upon the vitality of count I.

of privity or knowledge." Mem. Op. & Ord. at 27 (citing *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1305 (7th Cir. 1992)). Rather, Great Lakes argues that the district court impermissibly short-circuited the proceeding by dismissing its complaint on the pleadings.

The Limitation Act does not define the phrase "privity or knowledge," but its central meaning has been clear for at least fifty years. The Limitation Act is intended to shield from liability, beyond the amount of their interest in a vessel, "innocent shipowners and investors who were sued for damages caused through no fault or neglect of their own." *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 264 (1933). "Privity or knowledge," the absence of which is the touchstone of innocence according to the statute, is understood to be an owner's "personal participation . . . in the fault or negligence which caused or contributed to the loss or injury." *Coryell v. Phipps*, 317 U.S. 406, 411 (1943). What acts constitute "personal participation" is a troubling question in and of itself. *See Joyce v. Joyce*, 975 F.2d 379, 384 (7th Cir. 1992) (collecting cases). But when the shipowner seeking limitation of liability is a corporation, such as here, an equally puzzling antecedent question is raised: Whose participation is attributable to the corporation?

For purposes of determining a corporate shipowner's "privity or knowledge," we may divide its employees into two groups. One consists of corporate managers vested with discretionary authority. The other contains ministerial agents or employees. 3 Benedict on Admiralty § 42 at 5-14 (7th rev. ed. 1991). If a managerial employee is possessed of "privity or knowledge," i.e., if he or she personally participates in the activity that caused the alleged loss, the corporation is precluded from the benefit of the Limitation Act. *Id.* On the other hand, the privity or knowledge of purely ministerial employees is not attributable to the corporation. *Id.* Great Lakes is alleged to have negligently installed the pile clusters near the Kinzie Street Bridge. Such negligence presumably could be the result of any number of actions taken by any number of corporate

employees. For example, Great Lakes may have unreasonably failed to ascertain the existence of the freight tunnel beneath the river. Or, with full knowledge of the tunnel's existence, Great Lakes may have driven the pilings into the riverbed in a manner that unreasonably jeopardized the tunnel's integrity. The record is absolutely silent as to which corporate employees performed which tasks. We cannot determine, therefore, whether Great Lakes' negligence, if any, was, on the one hand, the product of unreasonable activity engaged in by one of its managerial employees or, on the other hand, the result of negligence or misconduct of one of its laborers at the job site. Because Great Lakes' ability to invoke the Limitation Act rests upon these precise determinations, the district court erred in dismissing the complaint.[10]

The district court relied upon our decision in *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992), in concluding that Great Lakes' ability to invoke the Limitation Act "will have no effect on [its] potential liability." Mem. Op. & Ord. at 28. In *Joyce*, the plaintiff charged that she was injured because a shipowner negligently entrusted his vessel to a person he knew, or should have known, was likely to use it in a manner involving an unreasonable risk of harm. The shipowner, an individual, sought to limit his liability pursuant to the Limitation Act. We concluded that the Limitation Act afforded the shipowner no protection because, if he did entrust the boat as alleged, he was not only negligent "but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the [Limitation Act]." *Id.* at 385. We further noted that if the owner did not negligently entrust his boat to someone he knew was unable to use it safely, he was not liable and thus had no need for the Limitation Act's pro-

[10] On remand, the district court, after adequate discovery, may have to decide whether certain activity was performed by "managerial" or "ministerial" employees. In this regard, we refer the district court to *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1303-04 (7th Cir. 1992).

tection. *Id.* Because the shipowner in *Joyce* was an individual, i.e., a natural person, our holding in that case is not appropriate to guide our decision here. The present case, which involves a corporate shipowner, lacks the same confluence of negligence and knowledge as existed in *Joyce*. Great Lakes is vicariously liable for the negligence of all of its employees. But it will be charged, for purposes of the Limitation Act, with the privity and knowledge only of certain managerial employees.

The district court also concluded that the "personal contracts doctrine" prevents Great Lakes from invoking the Limitation Act. Mem. Op. & Ord. at 30. This doctrine, except as we discuss below, may be inapplicable here and, in any event, is not a proper basis for dismissal on the pleadings. The liability Great Lakes seeks to limit arises primarily from claims sounding in tort, i.e., the claims of businesses, such as Grubart, that were in some way harmed when Chicago's downtown district was flooded. The "personal contracts doctrine," as its name suggests, provides only that the benefit of limited liability does not extend to certain *contractual* obligations. Specifically, contracts entered into by a shipowner "personally," rather than through the master employed for the ship, are beyond the reach of the Limitation Act. 3 Benedict on Admiralty, *supra*, at § 33. Only Great Lakes' contractual obligation "to indemnify the City . . . against all . . . loss" arising out of the installation of the piling clusters might fall into this category.[11] Mem. Op. & Ord. at 30-31. Contracts are "personal" to a corporate shipowner, however, only if they are executed by managerial employees acting within the scope of their discretion and authority. 3 Benedict on Admiralty, *supra*, at § 33. *See also* discussion *supra* at 12-13 & n.10. The present record is so undeveloped that we

[11] We assume, without deciding, that indemnity contracts are "personal" in the sense that a shipowner may not have the benefit of the Limitation Act against liabilities flowing out of them. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir. 1982).

cannot determine the status of the employee who signed the contract on Great Lakes' behalf. In no event, however, will the personal contracts doctrine affect Great Lakes' ability to obtain limitation of liability against anyone other than the City, and, even with respect to the City, the doctrine does not affect the potential limitation of tort liability.

For the foregoing reasons, the judgment of the district court is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 24, 1993

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable GARNETT T. EISELE, Senior District Judge*

No. 93-1421

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant

v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered this date.

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* The Honorable Garnett T. Eisele, Senior District Judge of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1993.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. GARNETT THOMAS EISELE, Senior District Judge*

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INC., an Illinois Corporation,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, *Judge.*

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* Honorable Garnett Thomas Eisele, of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause and the response thereto, no active members** of the court requested a vote thereon and all of the judges on the original panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

On further consideration of the petition for rehearing, the court amends its opinion issued August 24, 1993 as follows:

Delete the penultimate paragraph of the opinion (pp. 14-15) and substitute the following:

The district court also concluded that the "personal contracts doctrine" prevents Great Lakes from invoking the Limitation Act. Mem. Op. & Ord. at 30. This doctrine, except as we discuss below, may be inapplicable here and, in any event, is not a proper basis for dismissal on the pleadings. The liability Great Lakes seeks to limit arises primarily from claims sounding in tort, i.e., the claims of businesses, such as Grubart, that were in some way harmed when Chicago's downtown district was flooded. The "personal contracts doctrine," as its name suggests, provides only that the benefit of limited liability does not extend to certain *contractual* obligations. Specifically contracts entered into by a shipowner "personally," rather than through the master employed for the

** Honorable Ilana Diamond Rovner, Circuit Judge, did not participate in consideration of this petition for rehearing en banc.

ship, are beyond the reach of the Limitation Act. 3 Benedict on Admiralty, *supra*, at § 33. The only contractual obligation of Great Lakes that has been cited to this court and that might fall into this category is its duty "to indemnify the City . . . against all . . . loss" arising out of the installation of the piling clusters. Mem. Op. & Ord. at 30-31. Contracts are "personal" to a corporate shipowner, however, only if they are executed by managerial employees acting within the scope of their discretion and authority. 3 Benedict on Admiralty *supra*, at § 33. *See also* discussion *supra* at 12-13 and n.10. The present record is so undeveloped that we cannot determine the status of the employee who signed the contract on Great Lakes' behalf. Nor is it clear whether the contract imposes liability on Great Lakes for injuries to third parties. These are all matters that can be addressed by the district court on remand. In no event, however, will the personal contracts doctrine affect the potential limitation of tort liability.

We assume, without deciding, that indemnity contracts are "personal" in the sense that a shipowner may not have the benefit of the Limitation Act against liabilities flowing out of them. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir. 1982).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 15, 1993

Before
Hon. RICHARD D. CUDAHY, *Circuit Judge*

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INCORPORATED,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

Upon the CLAIMANT'S MOTION FOR STAY OF MANDATE filed herein on 10/31/93, by counsel,

IT IS ORDERED that the CLAIMANT'S MOTION FOR STAY OF MANDATE is GRANTED and the mandate in this appeal is STAYED to and including 11/15/93.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 21, 1993

Before
Hon. RICHARD D. CUDAHY, Circuit Judge

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INCORPORATED,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

This matter comes before the court for its consideration of the "GREAT LAKES' MOTION TO RECONSIDER THIS COURT'S ORDER STAYING THE MANDATE" filed herein on 10/18/93, by counsel for the plaintiff. On consideration thereof,

IT IS ORDERED that the GREAT LAKES' MOTION TO RECONSIDER THIS COURT'S ORDER STAYING THE MANDATE is DENIED.

[Dated February 18, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

92 C 6754

Complaint of GREAT LAKE DREDGE & DOCK COMPANY for Exoneration from or limitation of liability

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on defendant and claimant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, the motion is granted.

BACKGROUND

On April 13, 1992, the Chicago River broke through a breach in an underground freight tunnel lying beneath the river. The river flowed through the tunnel and into the

downtown commercial district of the City of Chicago and into the basements of the buildings connected to the tunnel. This inundation of the tunnel caused significant damage and resulted in the mid-day evacuation of the downtown district and the declaration of a state and federal emergency. To aid emergency repair, the Captain of the Port of Chicago ordered the river closed between Grand Avenue on the North Branch, Cermak Road on the South Branch, and Lake Michigan on the Main Branch. The river remained closed for over a month. River traffic ceased, several commuter ferries were stranded, and many barges could not enter the river system even south of Cermak Road because the river level was lowered to aid repair efforts.

Numerous lawsuits against Great Lakes Dredge & Dock Company ("Great Lakes") and the City of Chicago (the "City") arose from this occurrence, including the class action lawsuit on behalf of tens of thousands of individuals and thousands of businesses ("claimants"), which has been filed in Illinois state court and consolidated under the caption *In re Chicago Flood Litigation*, No. 92 L 5422 ("Class Complaint"). Because resolution of the present motion to dismiss rests in some part on the central issues and allegations raised in the state court litigation, we will address them briefly below.

According to the Class Complaint, the damages sustained by plaintiffs and the Class were caused by the partial collapse of the tunnel at the Kinzie Street Bridge, specifically, in the immediate vicinity of the area where pilings had been installed by Great Lakes pursuant to a contract with the City earlier in the year. Claimants allege that both Great Lakes and the City knew or should have known of the existence and location of the tunnel at the Kinzie Street Bridge and that the pile removal and pile driving

work completed by Great Lakes for the City could result in damage to the tunnel. It is also alleged that Great Lakes installed new pilings in a location other than that originally designated in its contract with the City, failed to remove all the pilings contracted to be removed, and failed to take adequate safeguards against a breach of the tunnel. According to the Class Complaint, Great Lakes, in pounding and driving the pilings into the riverbed, caused one or more of the following conditions: an actual hole or breach of the tunnel wall; a weakening of the tunnel wall creating cracks or weakness in the structural integrity of the tunnel; a compacting of the earth around the tunnel walls creating excessive pressure on the tunnel; and such other events which proximately caused the tunnel wall to partially collapse or break. Moreover, the claimants bring a number of claims against the City, arising, *inter alia*, from the City's alleged failure to repair the damage to the breached tunnel when it became known to the City and from the City's alleged failure to warn plaintiffs and the Class about this dangerous condition.

On October 6, 1992, Great Lakes filed suit in this Court seeking exoneration from or limitation of any liability it may incur from claimants' suit against it. Great Lakes seeks to limit its liability to the value of two barges and a launch boat pursuant to 46 U.S.C. App. §§ 183(a) and 185, the relevant sections of the Limitation of Shipowner's Liability Act, Rev. Stat. § 4281 *et seq.*, 46 U.S.C. § 181 *et seq.* (1982 ed.) (Count I),[1] and indemnity (Count II) or

[1] The Act itself refers to the proceeding as a petition to limit liability. 46 U.S.C.App. § 185. Procedurally, however, limitation actions under the Act are governed by Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. These rules refer to the pleading as a complaint for limitation of liability. Fed.R. Civ.P.Supp. Rule F(1). *Joyce v. Joyce*, 975 F.2d 379, 381 n. 2 (7th Cir. 1992).

contribution (Count III) from the City of Chicago in the event liability is found to exist in this case.

In response to Great Lakes' complaint in this Court, claimant Jerome B. Grubart, Inc. ("Grubart") and the City (collectively, "movants") filed their respective motions to dismiss pursuant to Rules 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Thereafter, an order was entered by this Court on October 8, 1992, which, in part, stayed and restrained the institution or further prosecution of any and all suits, actions, and proceedings against Great Lakes in any other court with respect to any claim or claims arising out of or occasioned by the Chicago tunnel disaster.

We find that this Court does not have subject matter jurisdiction over plaintiff Great Lakes' limitation action under the jurisdictional statutes establishing maritime jurisdiction. Moreover, we determine that Great Lakes' complaint seeking limitation of liability fails to state a claim upon which relief can be granted. Thus, we dismiss the present suit pursuant to both Rule 12(b)(1) and Rule 12(b)(6). In setting forth our present determination, we address the movants' 12(b)(1) motion and 12(b)(6) motion, respectively.

ANALYSIS

I. *MOTION TO DISMISS PURSUANT TO RULE 12(B)(1)*

Before discussing the merits of the movants' motions to dismiss, this Court must first recount the factual background to this dispute. While we recognize that many of the ensuing facts are the subject of contention by Great

Lakes and the movants,[2] we are guided in our review of these facts by the following legal standard.

1. *Legal Standard Governing Rule 12(b)(1) Motion*

The movants' 12(b)(1) motions attack the underlying facts asserted by Great Lakes in support of admiralty jurisdiction. Where a party properly raises a factual question concerning the court's jurisdiction, as through a Rule 12(b)(1) motion, the district court is not bound to accept as true the allegations of the complaint as to jurisdiction. *Gervasio v. United States*, 627 F. Supp. 428, 430 (N.D. Ill. 1986). Rather, the court may look beyond the jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists. *Id.* The party asserting jurisdiction, here, Great Lakes, bears the burden of supporting its jurisdictional allegations with competent proof and therefore "must submit affidavits and other relevant evidence to resolve the factual dispute regarding the court's jurisdiction." *Kontos v. United States Department of Labor*,

[2] Great Lakes responded to the City and Grubart's jurisdictional challenge by submitting seven sworn affidavits and five documentary exhibits. It is against this evidence that Grubart directs his motion to strike, which is also presently before this Court. We find that, for the most part, Grubart's objections go to the weight, not the admissability, of Great Lakes' evidentiary materials. It is for the Court to determine the relevancy of these materials and the weight to be given to the factual matters asserted therein, which we have done accordingly. *See Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). In reaching our present determination to grant Grubart and the City's motions to dismiss Great Lakes' limitation action, the Court has accorded proper weight to the affidavits and exhibits submitted by Great Lakes and, therefore, need not lend Grubart's motion to strike any further consideration.

826 F.2d 573, 576 (7th Cir. 1987); *Norman v. Levy*, 756 F. Supp. 1060, 1062 (N.D. Ill. 1990).

2. *Facts Pertaining to the Court's Jurisdictional Inquiry*

In December, 1990, the City invited marine firms including Great Lakes to bid on a project to replace fourteen pile clusters, also known as timber dolphins, at five separate bridge sites in the Chicago River. Great Lakes won the contract. One of the sites included in the project was located at the south side of the Kinzie Street Bridge. During the last week of August and the first three weeks of September, 1991, Great Lakes' barge crew removed old, deteriorating pile clusters and drove new pilings into the riverbed at the Kinzie Street site. Over six months after Great Lakes completed its work under the contract, on April 13, 1992, the Chicago River broke through the tunnel system running beneath the river and flooded Chicago's business district.

Pursuant to the City and Great Lakes' contract, Great Lakes alleges that in July and August, 1991, it employed three vessels to various sites along the North and South Branches of the Chicago River, ultimately to a point alongside the Kinzie Street Bridge. The three Great Lakes' vessels involved in removing and replacing the Kinzie Street pile clusters consisted of two barges and one launch or tug, called the M/V PEACH STATE. Both barges are allegedly "load line certified" by the American Bureau of Shipping, meaning they are registered to navigate in open, unprotected waters and meet seaworthiness criteria. One barge, G.L. 150, is said to weigh 350 tons and have a length of 131.1 feet and breadth of 34 feet. The other barge, the G.L. 136, weighing 426 tons, with a length of 121 feet and breadth of 44 feet, was called in Great Lakes'

Foreman's Daily Reports either "Spud Scow 136" or "Barge 136," a title, according to Grubart, that depended upon the nature of the work being performed.[3] G.L. 136 was fixed at the Kinzie Street site during the pile-driving job, and it is from this barge that the pilings were driven.

Both barges were used occasionally to transport the Great Lakes crew from one work site to the next. Barge G.L. 136 transported a crane and related equipment to and from each work site and the Great Lakes' facilities on the Calumet River. The other barge, G.L. 150, primarily served to transport the new pilings from Great Lakes' facilities on the Calumet River to the work sites and to stow the old pilings until the work was completed. With regard to the launch, the M/V PEACH STATE regularly towed the barges whenever the work required repositioning, and every morning and night towed at least one of the barges to and from the night berth and work site. Moreover, pursuant to its contractual duty stated below, the M/V PEACH STATE towed the barges out of the navigable channel whenever another vessel sought passage.

Great Lakes alleges that only marine firms can perform the pile driving work requested by the City because this work must be performed from vessels in the navigable

[3] On the sole basis of selective Great Lakes' Foreman Daily Reports, which do not state the tasks to be performed that day, Grubart argues that Great Lakes treated G.L. 136 differently, depending on its use at the time. According to Grubart's unsubstantiated reading of the reports, during the pile-driving activity, Great Lakes considered G.L. 136 to be a spud scow, which is designed as a work platform that is affixed in position by dropping its spuds in the river bed or by lifting itself out of the water for stability. On the other hand, according to Grubart, upon the completion of the pile driving work, when G.L. 136 was being transported back to Great Lakes' yard, Great Lakes considered G.L. 136 to be a barge.

channel and such vessels have to be moved from time to time to permit other maritime traffic to pass. In support of its position, Great Lakes cites Provision 209 of the contract, which specifically required Great Lakes to comply with U.S. Coast Guard regulations protecting the right of other vessels to navigate past the work sites:

> The Contractor's attention is directed to the fact that the Branches of the Chicago River involved are navigable streams. As such, the bridges involved herein must be open to masted vessels at any time on signal . . . . During the execution of the contract, marine regulations shall be complied with in every way, so that river traffic may be protected and any river obstruction avoided . . . .

Moreover, the contract's construction methods indicate that the pile removal and driving work would involve work below the waterline of the Chicago River and required the contractor to supply all labor and equipment necessary to perform the pile driving work, including, *inter alia*, barges and tugs.

Although there is some dispute between the parties as to the intended purpose of the pile clusters at the Kinzie Street location, it is clear that they were principally intended for the protection of the bridge at that site. The City argues that this was their sole purpose and, in the state court litigation, Great Lakes repeatedly stated that the pilings were intended to protect the bridge. In the instant litigation, Great Lakes has taken the position that the pile clusters were designed for several purposes, including the protection of vessels and use as navigational aids.

In addition to the fact that the City and Great Lakes have, on prior occasions, repeatedly stated that the purpose for the dolphins was to protect the bridge and bridgehouse, the June 7, 1990 City ordinance authorizing

the dolphin replacement project read, in part, "[t]hat said Project generally consist of the replacement of pile clusters at various bridges within the City, in order to provide the structures with increased protection from the possibility of collision by marine traffic." Great Lakes' complaint asserts that the pilings are located "next to," and therefore outside, the navigable channel. (G.L. Complaint ¶ 4). Thus, even according to Great Lakes' complaint, pilings are not entirely surrounded by navigable water. Implicit in Great Lakes' complaint is the acknowledgement that the pilings are not "solely" or "principally" in aid of navigation.

3. *Discussion*

Both movants contend that Great Lakes' complaint should be dismissed under Rule 12(b)(1), because 28 U.S.C. § 1333(1) and 46 App. U.S.C. § 740, the jurisdictional statutes relied upon by Great Lakes to establish maritime jurisdiction, do not support subject matter jurisdiction in this case. As stated previously, once the existence of subject matter jurisdiction is challenged in a motion to dismiss under Fed.R.Civ.P. 12(b)(1), the burden of establishing such jurisdiction through relevant, competent evidence shifts to the party asserting the same. *Norman*, 756 F. Supp. at 1062; *Gervasio*, 627 F. Supp. at 430. For the reasons set forth below, we find that Great Lakes has not met its burden of establishing this Court's subject matter jurisdiction, and, accordingly, we grant movants' 12(b)(1) motion to dismiss.

A. *The Court Lacks Jurisdiction Under 28 U.S.C. § 1333(1)*

Courts have held that federal admiralty jurisdiction exists in a particular case only if the protection of maritime activity through adherence to a uniform and specialized set of rules governing that activity on navigable waterways is essential. A trilogy of Supreme court cases confines the exercise of admiralty jurisdiction under 28 U.S.C. § 1333(1) to actions satisfying the following two prerequisites:

1. the alleged wrong must occur on navigable waters (situs test); and
2. the alleged wrong must bear a significant relationship to "traditional maritime activities" (nexus test).

Sisson v. Ruby, 497 U.S. 358, 110 S. Ct. 2892, 2895-98 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982); *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 266 (1972).

Prior to 1972, the determination of whether a tort was maritime depended solely upon the situs of the wrong. In 1972, the Supreme court in *Executive Jet*, a case which arose out of an aircraft accident over navigable water, rejected this strict situs test stating:

> [i]t is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Executive Jet, 409 U.S. at 268. Although the Court's holding in *Executive Jet* was limited by its terms to cases involving aviation torts, the Supreme Court applied *Executive Jet* to determinations of federal admiralty jurisdiction outside the context of aviation torts in *Foremost. Sisson*, 110 S.Ct. at 2895 (*citing Foremost*, 457 U.S. at 673).

With regard to the "nexus" test, the Supreme Court held in *Foremost* that all tort actions invoking admiralty

jurisdiction must meet *Executive Jet*'s new nexus test, requiring a significant relationship with "traditional maritime activity." *In re Complaint of Sisson*, 867 F.2d 341, 343 (7th Cir. 1989), *rev'd on other grounds*, 110 S.Ct. 2892 (1990) (*citing Foremost*, 457 U.S. at 673-74). When defining traditional maritime activity, the Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," and stated the federal interest in protecting maritime commerce "can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* (citing *Foremost*, 457 U.S. at 674-75). The *Foremost* Court, in holding that the collision between two pleasure boats fell within the federal courts' admiralty jurisdiction, ruled:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Foremost, 457 U.S. at 675.

In *Sisson v. Ruby*, a case involving a fire on a noncommercial vessel docked at a recreational marina on Lake Michigan, the Supreme Court further clarified the nexus component of the jurisdictional inquiry under § 1333. The *Sisson* Court reiterated the admiralty jurisdiction principles it had stated in a footnote within the *Foremost* opinion, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction, but that when a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity . . . admiralty jurisdiction is appropriate." *Sisson*, 110 S.Ct. at

2895-96 (*citing Foremost*, 457 U.S. at 675 n. 5). In view of this statement, the *Sisson* Court discerned a "two-part *Foremost* test," which requires the party seeking to invoke maritime jurisdiction to show that there existed (1) an incident having a potentially disruptive impact on maritime commerce, and (2) a substantial relationship between the activity giving rise to this incident and traditional maritime activity. *Id.* at 2896-97.

Great Lakes alleges in its complaint that the Admiralty Extension Act, 46 U.S.C. App. § 740 also supplies a jurisdictional base for its complaint. That statute provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land.

It has been held that the Admiralty Extension Act was intended to eliminate the inequities and anomalies resulting from the strict application of the situs rule in admiralty under then existing law. The Act was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality imposed on general maritime tort claimants. Claims under the Admiralty Extension Act are to be subject to the "maritime relationship" rule of *Executive Jet*. *Sohyde Drill & Marine v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1136 (5th Cir. 1981); *see also Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 768 (11th Cir. 1984); *Dean v. Maritime Overseas Corp.*, 770 F. Supp. 309, 312 (E.D. La. 1991); *Felix v. Arizona Dep't of Health Services, Goods, Vital Records Section*, 606 F. Supp. 634, 636 (D. Ariz. 1985); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-89 (N.D. Ill. 1978).

The test to determine the presence or absence of a significant relationship to traditional maritime activities in a particular case has been described in varying formulations. Judge Aspen of this Court has said that "the preferred course . . . is to evaluate the entire scope of events involving both the defendant's behavior and the manner in which the plaintiff is injured in evaluating whether there is a connection with traditional maritime activity significant enough to establish admiralty jurisdiction." *American Nat. Bank & Trust Co. of Waukegan v. United States*, 636 F. Supp. 147, 149 (N.D. Ill. 1986). This test may be described as the totality of circumstances test. The Fifth Circuit, in the case of *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1974), has outlined four factors which may be considered in determining the existence of a substantial maritime relationship:

1. the functions and roles of the parties;
2. the types of vehicles and instrumentalities involved;
3. the causation and type of injury; and
4. traditional concepts of the role of admiralty law.

Sohyde, 644 F.2d at 1136.

In *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987), the four criteria set forth in *Kelly* were addressed in light of the Supreme Court's decision in *Executive Jet* and *Foremost*. The indicia of maritime flavor described in the latter two cases was described as (1) the impact of the event on maritime shipping and commerce, (2) the desirability of a uniform national rule to apply to such matters, and (3) the need for admiralty "expertise" in the trial and decision of the case. The Fifth Circuit then held that the analysis of *Kelly* should be applied with the indicia divined from *Executive Jet* and *Foremost*.

However the test is stated, the logical starting point in the analysis is the nature and quality of the wrong or wrongs alleged in the case. Although the Class Complaint alleges a litany of tortious conduct on the part of Great Lakes, at bottom it rests on the proposition that Great Lakes' pile-driving activity was negligently performed, causing a breach in the tunnel wall and the resulting flood of the tunnel and portions of the Chicago business district. The charges against the City also involve alleged failure to prevent or cure Great Lakes' breach of the tunnel wall, thereby failing to prevent the flooding of the tunnel and the class properties.

It is significant to note that the alleged wrongs did not involve the movement or collision of a vessel. Nor did the alleged wrongs involve the transport of cargo or people on a navigable waterway. Nor can it be said that the tunnel or the walls were somehow part of the Chicago river or any other navigable waterway. Indeed, the tunnel and its environs were part of the land and the significant injuries that were suffered were the result of the *proximity* of the tunnel to the river—an unfortunate but fortuitous geographical configuration.

Additionally, the pile-driving activity and the placement of the new dolphins were undertaken primarily to protect the Kinzie Street bridge and its machinery, long ago held to be part of the land and not part of the river waterway. In *Cleveland Terminal & Valley R. R. Co. v. Cleveland S. S. Co.*, 208 U.S. 316 (1908), plaintiff sued in admiralty for damage sustained to a center pier of a drawbridge and its protective pilings when a steamer collided with the pier. The Supreme Court ruled that the situs requirement had not been established because "the bridges, shore docks, protection piling, piers, etc, pertain to the

land" and thus were not within the court's admiralty jurisdiction. Although the Admiralty Extension Act has eliminated the situs requirement, it did nothing to alter the holding of *Cleveland Terminal* that protective pilings for bridges pertained to the land, and in evaluating the totality of circumstances here, it maintains that character.

The parties are at odds over whether the activity of pile driving is, itself, a traditional maritime activity. The City argues that pile driving is an activity common to the construction industry, regardless of the project's location, and is not unique to rivers or bodies of water. Standing alone, the City's assertion is a truism. Great Lakes' principal argument on this point is that pile clusters, or dolphins, are vital to maritime commerce and their use as navigational aids is not subject to dispute. Both sides cite cases in support of their respective arguments. Frankly, the cited cases are not dispositive in categorizing pile driving activity, and other factors present color the decisions in the cited cases. As we previously held, however, the main purpose of these dolphins was the protection of the bridge and its operating mechanisms. It is that function which predominates in the overall analysis of whether we are dealing here with a traditional maritime activity.

Both sides have expended considerable energy in debating whether the two barges and the launch are "vessels" within the meaning of section 740. The decided cases support both positions and are, in reality, irreconcilable. In *Ellender v. Kiva Constr. & Eng'g Inc.*, 909 F.2d 803, 806 (5th Cir. 1990), the Fifth Circuit ruled that a spud barge used for pile driving was not a vessel under the Jones Act because the "barge was not designed or used to transport passengers, cargo, or equipment from place to place across navigable waters, where the barge required

tug boats or other vessels to move it, and where the barge remained virtually stationary during any particular project." Although the barge at issue there, like Great Lakes' barges here, supported a mobile crane and other equipment, the court held that "these transportation functions [were] incidental[ ] to its other uses," and thus insufficient to confer "vessel" status on the barge. *Id.* at 807; *see also Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 832 (5th Cir. 1984) ("a structure whose primary function is to serve as a work platform does not become a vessel [under Jones Act] even if it sometimes moves significant distances across navigable waters in the normal course of operations"); *accord, Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973).

The Seventh Circuit has also spoken on the issue, however, and we are bound by its view. In *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), the definition of "vessel" for Jones Act purposes was set forth:

> The "vessel in navigation" requirement pertains not to the vessel's mobility at the precise moment of injury, but to whether it has at times been employed as a means of transport on water for passengers or cargo and has not been withdrawn from navigable waters and laid up, say, for the season . . . . Any floating structure, including those designed for special purposes, is a "vessel" capable of having a maritime "crew" so long as the structure at some time serves as a means of transport on water. "To be a vessel, the purpose and business must to some reasonable degree be the 'transportation of passengers, cargo, or equipment from place to place across navigable waters.' " (citations omitted).

Id. at 1063.[4] Mindful of the transport functions performed by each, we determine that the two barges and the launch utilized by Great Lakes to perform the pile removal and driving activity required under the contract were vessels for admiralty purposes.

Having resolved the question of whether the barges and launch were vessels, we next address whether the injuries at issue were "caused by a vessel on navigable water," the Section 740 requirement, or whether the alleged wrong bears a significant relationship to traditional maritime activities. In analyzing both issues it is apparent that the particular *function* of the vessels involved is far more important than their classification as vessels. Only in this way can we harmonize *Johnson* with the cases, cited above, which differ in result. It bears repeating that the Supreme Court has held that the requisite substantial relationship between the activity giving rise to the incident and traditional maritime activity is not always present whenever navigable water or a vessel is involved.

In determining the jurisdictional issue, it is as important to examine what the case does not involve as it is to examine what it does. The following summary addresses both concepts:

1. None of the vessels were directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.

[4] *Johnson* involved an ironworker who sued a barge owner under the Jones Act, 46 U.S.C. § 688, for injuries sustained while working on a construction barge, which, like the G.L. 136 present in this case, had no motive power of its own and no steering capability and whose primary role was to provide a construction site and assist in the construction of the designated project.

2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.
3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.
4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins at the Kinzie Street site was the protection of the bridge, which the Supreme Court views as an extension of the land.
5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.
6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

In summary, the relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of circumstances lead unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-

based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and supply none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without it, no admiralty jurisdiction.

The case of *National Union Fire Ins. Co. of Pitts, Pa. v. U.S.*, 436 F. Supp. 1078 (M.D. Tenn. 1977), is instructive. That case involved water damage to some stock stored in a warehouse as a result of flooding by the Cumberland River. The United States was accused of negligent operation of certain dams on the Cumberland. The court stated:

> [T]he activity [at issue should be appraised] in terms of its actual effects as well as its general nature. Thus, while control of the water level does generally involve considerations affecting navigation and commerce upon the water, the only actual impact of concern in this instance is the flooding of a shore-based warehouse. Viewed in this way, it becomes more difficult to perceive an actual maritime incident for which the unique principles and procedures of admiralty are pertinent. Had the rising water caused boats to break from their moorings and sustain damage, or inundated a barge and destroyed its cargo, this court would have little difficulty in finding admiralty jurisdiction. However, where the actual untoward consequence is of a kind which can readily be dealt with by resort to established common law tort principles, it makes no sense to dredge up (no pun intended) a whole body of law whose purpose and history is inextricably bound up in matters concerning maritime commerce. It should not be overlooked that the navigability of the Cumberland River, which is a *sine qua non* of admiralty jurisdiction, had nothing whatever to do with the injuries sustained in this case. It is not inconceivable that a stopped

> up storm drain, during an abnormally heavy rainfall, could have resulted in essentially the same damage to the material in the warehouse. And in such a case, a suit against the municipality (assuming no immunity) alleging negligent failure to keep the sewers cleared of debris, could easily be disposed of within the contours of state tort law. The fact that the alleged culprit in the instant case was the Corps of Engineers and that the destructive force happened to be a navigable stream does not alter the availability, viability, and indeed, the preferability of state law for disposing of this case.

Id. at 1083.

Finding similar prior cases to assist in guiding judicial decision is not an exact science. Conjuring up the unique set of facts giving rise to the great Chicago Flood might best be the product of fiction writers—after all, how many major cities come equipped with miles of subterranean tunnels whose existence is unknown to most of its inhabitants? But even though the facts of *National Union* may be dissimilar to the quite unique facts of the instant case, its reasoning does apply.

As in *National Union*, the mere fact that the injuries were allegedly caused by water from a navigable river is insufficient to establish admiralty jurisdiction. Nor does this case involve issues such as navigation or the sea worthiness of vessels that admiralty law was designed to address. Consequently, there is no basis for federal admiralty jurisdiction.

B. *The Limitation Of Shipowner's Liability Act Does Not Provide A Separate Basis Of Admiralty Jurisdiction*

The Supreme Court in *Sisson* declined to resolve the parties' contentions regarding whether the Limitation of

Shipowner's Liability Act, 46 U.S.C. § 181 *et seq.*, provides an independent basis for federal jurisdiction. 110 S.Ct. at 2894 n. 1. Nonetheless, the Seventh Circuit definitively ruled in *In re Complaint of Sisson*, 867 F.2d at 349-50, in a portion of the opinion not reversed by the Supreme Court, that the Limitation of Liability Act does not independently confer admiralty jurisdiction. The Seventh Circuit stated:

> In our view, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction . . . . We believe that allowing admiralty jurisdiction here would be contrary to the policy of *Executive Jet* and *Foremost*. In creating the nexus requirement, the Supreme Court confined the reach of admiralty jurisdiction to include only those tort actions with which a uniform, sea-going jurisprudence should be concerned. To permit an alleged tortfeasor to circumvent the requirement that the tort bear a connection to traditional maritime activity simply by asserting a right to limit liability would eviscerate the nexus test.

Id. Accordingly, in keeping with the Seventh Circuit's clear dictate and our prior discussion, we hold that the Limited Liability Act does not provide this Court with an independent basis for federal jurisdiction.

In sum, Great Lakes has failed to meet its burden of establishing this Court's subject matter jurisdiction over its limitation of liability action, and, therefore, Great Lakes' suit is dismissed pursuant to Rule 12(b)(1).

II. *MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)*

Even if we were to have found that this Court has subject matter jurisdiction over the present suit, we determine that Great Lake's complaint fails to state a claim upon which relief can be granted. Great Lakes seeks exoneration from or limitation of its liability for the accident pursuant to the Limitation of Shipowner's Liability Act, 46 U.S.C. § 181 *et seq.* (the "Act"). The Act limits the liability of a shipowner for any loss incurred without the knowledge or privity of the owner to the value of the vessel and its freight. 46 U.S.C. § 183(a). A shipowner may petition a district court of proper jurisdiction for exoneration from or limitation of liability. 46 U.S.C. § 185. Upon the shipowner's filing of the petition and his tender of an adequate bond, the district court must enjoin all other proceedings against the shipowner involving issues arising out of the subject matter of the limitation action. *Id. See also Ex Parte Green*, 286 U.S. 437, 438-40 (1932); *S & E Shipping Corp. v. Chesapeake & O. R. Co.*, 678 F.2d 636, 642 (6th Cir. 1982). The district court must ultimately decide whether the shipowner has a right to limitation of liability; the claimants may pursue their common law remedies in another forum only if they concede that the district court has exclusive jurisdiction over the question of whether liability is limited. *See S & E Shipping Corp.*, 678 F.2d at 643 n. 13; *Helena Marine Service, Inc. v. Sioux City*, 564 F.2d 15, 18 (8th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

Both movants assert that Great Lakes' complaint should be dismissed on the basis that Great Lakes is foreclosed as a matter of law from obtaining limitation of liability under the Act. The movants base this contention on their allegation that Great Lakes was in privity to and with

knowledge of the alleged negligence. The City additionally seeks summary dismissal of Great Lakes' complaint on the ground that Great Lakes is not entitled to limitation based on the "personal contract doctrine." Great Lakes refutes both arguments, arguing that it has stated a *prima facie* case for limitation under the Act and its claim for exoneration is compelling in light of the City's failure to advise Great Lakes about the existence of the tunnel. Before addressing the parties' contentions, we first discuss the appropriate legal standard by which to judge a motion to dismiss pursuant to Rule 12(b)(6).

1. *Legal Standard Governing 12(b)(6) Motion*

To withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Conley v. Gibson*, 355 U.S. 41 (1957). The defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. *See also Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to

decide the merits of the case. We address the City and Grubart's motion with these principles in mind.

2. *Discussion*

A. *Great Lakes' Claim For Limitation Of Liability Under Count I Should Be Dismissed*

i] *"Privity or Knowledge" Basis For Dismissal Of Limitation Claim*

The Limitation of Shipowner's Liability Act allows district courts, under their admiralty jurisdiction conferred by 28 U.S.C. § 1331, to determine whether a shipowner's liability should be limited when that liability may be predicated on an act that was not within the shipowner's "privity or knowledge." *Joyce v. Joyce*, 975 F.2d 379, 383 (7th Cir. 1992). Section 183(a) provides:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners*, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(emphasis added).

In limitations proceedings, the ultimate burden of proving lack of privity or knowledge is on the shipowner. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1305 (7th Cir. 1992). In discerning the meaning of the Act's phrase "privity or knowledge," the Seventh Circuit in *Joyce* found, "Congress intended the principal beneficiaries of

the Act to be innocent shipowners and investors who were sued for damage caused through no fault of their own." *Joyce*, 975 F.2d at 384. The Seventh Circuit observed recently in *In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1303, "The recent judicial trend has been to enlarge the scope of activities within the 'privity or knowledge' of the shipowner . . . ." *Id.*

In opposing the present motion to dismiss, Great Lakes does not confront the recent Seventh Circuit rulings addressing the "knowledge and privity" inquiry relied upon by movants but, rather, cites the Eleventh Circuit case, *M/V Sunshine, II v. Beavin*, 808 F.2d 762 (11th Cir. 1987), for the proposition that summary dismissal of a limitation action before the completion of discovery is inappropriate. This argument, however, ignores the recent Seventh Circuit ruling in *Joyce*, where the court affirmed a district court's *sua sponte* dismissal of a limitation complaint for lack of subject matter jurisdiction. 975 F.2d at 385-86. Moreover, this Court finds that the principles recently articulated by the Seventh Circuit in its *Joyce* and *Amoco Cadiz* rulings counsel dismissal of Count I of Great Lakes' complaint under Rule 12(b)(6).

In *Joyce v. Joyce*, a vessel owner, who had been sued in state court for negligent entrustment of his boat to another filed a limitation action in federal court under the Act. The district court *sua sponte* dismissed the vessel owner's complaint for lack of subject matter jurisdiction and the Seventh Circuit affirmed. After exploring the meaning of the phrase "privity or knowledge" under the Act and the law of negligent entrustment, the Seventh Circuit reasoned:

> Given the nature of the tort of negligent entrustment, it is clear that the Limitation of Shipowner's Liability Act affords no protection to William. If William knew or had reason to know that Ivkovich should not have been entrusted with the boat, he not only committed the tort of negligent entrustment but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the Limitation of Liability Act. On the other hand, if William did not entrust the boat to Ivkovich under circumstances in which he knew or should have known of Ivkovich's inability, he will incur no liability for negligent entrustment and, consequently, has no need of the Act's protection. In either case, the district court could not do anything to affect either party and was correct to dismiss the suit for lack of subject matter jurisdiction. Prompt, *sua sponte* recognition of flaws in subject matter jurisdiction is commendable.

975 F.2d at 385-86.

Regardless of the different allegations of negligence in the present case, we find that the *Joyce* rationale is determinative of the present 12(b)(6) motion. As in *Joyce*, the extension of admiralty jurisdiction in the present case will have no effect on Great Lakes' potential liability. Underlying the claimants' negligence claims against Great Lakes in the consolidated Class Complaint is the allegation that Great Lakes knew or should have known of the existence and location of the tunnel at the Kinzie Street Bridge and that the work required under the contract could result in damage to the tunnel.[5] Following *Joyce*'s reasoning, if Great Lakes is found not negligent, Great Lakes will have no need for the Act's protection. On the other hand, if

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[5] For example, the class action claimants allege that the contract between Great Lakes and the City advised Great Lakes in part that moving the pilings in any fashion could result in damage to underground structures. The Court's reading of the relevant portion of the contract confirms the existence of this notification. *See* Contract at DS-5.

Great Lakes is found, for example, to have had constructive knowledge of the tunnel system or to have driven the piles into the riverbed in a negligent manner (e.g. at the wrong point along the riverbed), the Act affords Great Lakes no protection because such a finding would establish that Great Lakes had either knowledge or constructive knowledge sufficient to place it beyond the protection of the Act. Accordingly, a finding of negligence liability against Great Lakes will be tantamount to a finding of Great Lakes' privity or knowledge, thereby precluding Great Lakes from seeking limitation pursuant to the Act under *Joyce*.[6]

Thus, the present case, while involving different allegations of negligence, nonetheless, constitutes the identical situation confronted by the Seventh Circuit in *Joyce*: a finding of negligence will be tantamount to a finding of privity or knowledge and a finding of nonliability will moot

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[6] The Seventh Circuit's *Amoco Cadiz* decision lends support to our present determination in that it articulates a low threshold for establishing privity or knowledge sufficient to deny petitioners protection under the Act. In *Amoco Cadiz*, the Seventh Circuit rejected the petitioning shipowner's contention that a vessel owner's actual or constructive knowledge of the causal negligence must be shown to establish "privity or knowledge." In refuting this argument, the Seventh Circuit stated:

> Not so. Privity or knowledge is not tantamount to actual knowledge or direct causation. All that is needed to deny limitation is that the shipowner, "by prior action or inaction set[s] into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of a casualty . . ." *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1158 (2nd Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

Amoco Cadiz, 954 F.2d at 1303. In view of this low threshold, a finding of Great Lakes' negligence would satisfy this standard without question.

the limitation claim. Mindful of the Seventh Circuit's determination that the petitioner's claim for limitation could not be realized in this very situation, we dismiss Great Lakes' limitation claim under Count I for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6).

ii] *"Personal Contract Doctrine" Basis For Dismissal Of Great Lakes' Limitation Claim*

This Court finds that another independent basis exists for the dismissal of Great Lakes' suit under Rule 12(b)(6), namely, Great Lakes is not entitled to limitation based on the "personal contract doctrine." Great Lakes' pile driving work was performed pursuant to a written contract with the City under which Great Lakes undertook numerous duties and warranties and agreed to indemnify the City against any loss arising from the contract work. *See, e.g.*, contract at G-1 ("Contractor shall indemnify, keep and save harmless the City, its agents, officials, and employees, against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor . . . .").

Under clear precedent, the Act has been held not to apply where the liability of the owner rests on his personal contract. *Coryell*, 317 U.S. 406, 409 (1943) (*citing Pendleton v. Brenner Line*, 246 U.S. 353 (1917)); *Richardson v. Harmon*, 222 U.S. 96, 106 (1911) (the Limitation Act "limit[s] the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the

master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts"); *S & E Shipping Corp.*, 678 F.2d at 644. The Supreme Court established the personal contract exception because the Act is only intended to limit the shipowner's liability for matters beyond his control, and a personal contract is within the control of the shipowner. *S & E Shipping Corp.*, 678 F.2d at 644 n. 14. On this basis, we find that Great Lakes' liability stemming from its personal contract with the City is not subject to limitation under the Act.

The Supreme Court and lower courts have clearly indicated that the primary purpose of an exoneration or limitation of liability action by vessel owners in federal admiralty court is to ensure the fair distribution of a limitation fund among all claimants. *See Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151 (1957); *In re Complaint of Falkiner*, 716 F. Supp. 895, 901 (E.D. Va. 1988). The purpose of the *concursus*, the proceeding before the admiralty court in which all competing claims must be litigated, is to provide for a marshalling of assets and for a *pro rata* distribution of an inadequate fund among claimants. *S & E Shipping Corp.*, 678 F.2d at 642. *See also Lake Tankers Corp.*, 354 U.S. at 151-53.

Here, in light of our present determination under the personal contract doctrine, *concursus* is no longer required, because the only remaining claims against Great Lakes still subject to the Act are those raised by the class action claimants. *See S & E Shipping Corp.*, 678 F.2d at 643 (the district court must dissolve a stay of proceedings and permit claimants to litigate their claims in the state forum if only one claim against the shipowner is made; "[i]n this situation a *concursus* is unnecessary because there are no additional claimants competing for portions

of the limitation fund"). If *concursus* of a limitation fund is not necessary, we are instructed to permit claimants to litigate their claim in the state forum. *In re Complaint of Falkiner*, 716 F. Supp. at 901. *See also Lake Tankers Corp.*, 354 U.S. at 151; *S & E Shipping Corp.*, 678 F.2d at 642-45. Thus, this constitutes yet another basis for our dismissal of Great Lakes' limitation claim.

B. *Great Lakes' Claim For Exoneration Under Count I Should Be Dismissed*

Where, as here, an alleged vessel owner is foreclosed from obtaining limitation of liability, the vessel owner is also foreclosed from proceeding in federal court with the exoneration component of its claim against the wishes of the claimants. *Lake Tankers Corp.*, 354 U.S. 147; *Wheeler v. Marine Navigation Sulphur Carriers, Inc.*, 764 F.2d 1008, 1011 (4th Cir. 1985) (ruling "[e]ach circuit that has considered this question has ruled that once limitation is denied, plaintiffs should be permitted to elect whether to remain in the limitation proceeding or to revive their original claims in their original fora"); *Fecht v. Makowski*, 406 F.2d 721, 722-23 (5th Cir. 1969) ("where no grant of limitation is possible, the damage claimants are entitled to have the injunction against other actions dissolved, so that they may, if they wish, proceed in a common law forum as they are entitled to do"); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 595-96 (2nd Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *In re Complaint of Falkiner*, 716 F. Supp. at 901. Under the foregoing authorities and in consideration of the claimants' desire to prosecute their class action in state court, we find it appropriate to dismiss Count I of Great Lakes' complaint in its entirety, including the claim for exoneration.

C. *Counts II and III Should Be Stricken*

Because Count I of Great Lakes' complaint for exoneration or limitation is properly dismissed, Counts II and III, which seek indemnity and contribution from the City by way of impleader under Federal Rule of Civil Procedure 14(a) and (c), should be stricken as well for lack of subject matter jurisdiction. The relief requested in both of these counts is contingent upon a finding of liability under Count I; however, upon Count I's dismissal, the indispensable predicate for the adjudication of Counts II and III is no longer present. Given the central purpose of Rule 14, which is to promote judicial economy and efficiency, *Colton v. Swain*, 527 F.2d 296, 299-300 (7th Cir. 1975), we discern no justification for retaining jurisdiction of Counts II and III, and we strike them accordingly.

CONCLUSION

For the foregoing reasons, we dismiss Great Lakes' complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

/s/ Charles P. Kocoras
Charles P. Korcoras
United States District Judge

Dated: February 18, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Great Lakes Dredge & Dock Company

v. Case Number: 92 C 6754

City of Chicago

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Great Lakes' complaint is hereby dismissed.

Final judgment is entered.

February 18, 1993
Date

H. STUART CUNNINGHAM
Clerk

/s/
(By) Deputy Clerk